CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. ~~586~~ 227.

CHARLES H. TREAT, U. S. COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

vs.

STEPHEN V. WHITE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MARCH 19, 1900.

(17680.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 566.

CHARLES H. TREAT, U. S. COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

vs.

STEPHEN N. WHITE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Certificate of United States circuit court of appeals for second circuit	1	1
Statement of the case	1	1
Exhibit A—Call	2	1
Question certified	2	1
Complaint	4	2
Exhibit A—Call	7	3
Answer	8	4
Clerk's certificate	11	5

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1 United States circuit court of appeals for the second circuit.

CHARLES H. TREAT, UNITED STATES COLLECTOR of internal revenue, plaintiff in error,
vs.
STEPHEN V. WHITE, DEFENDANT IN ERROR.

Certificate for instructions.

To the Supreme Court of the United States:

This action was commenced in the New York supreme court, city and county of New York, by the service of a summons and complaint. Subsequently the United States attorney for the southern district of New York, representing the collector of internal revenue, removed the action to the U. S. circuit court for the southern district of New York pursuant to the provisions of sec. 643, R. S. of the United States.

This cause came before this court on a writ of error to the United States circuit court for the southern district of New York to review a judgment of that court by which the defendant in error recovered judgment against the plaintiff in error for the sum of six hundred and twenty-six dollars and seventy-five cents.

Upon said writ of error a question of law was presented as to which this court desires the instruction of the Supreme Court for its proper decision.

The pleadings are annexed.

The facts are as follows:

From the 1st day of July, 1898, until the date of the commencement of this action the defendant in error, Stephen V. White, was doing business as a stock broker on the New York Stock Exchange. In the course of his business White sold "calls" upon 30,200 shares of stock, the
2 said "calls" being of the same tenor and effect as Exhibit A, hereinafter set forth, and only varying in the names of the stock, the date, and the price at which they were offered.

EXHIBIT A.

NEW YORK, *May 18th, 1899.*

For value received the bearer may call on me on one day's notice, except last day, when notice is not required. One hundred shares of the common stock of the American Sugar Refining Company, at one hundred and seventy-five per cent any time in fifteen days from date. All dividends, for which transfer books close during said time, go with the stock. Expires June 2, 1899, 3 p. m.

(Signed) S. V. WHITE.

These 30,200 shares of stock, for which "calls" at various times had been in existence, were, as matter of fact, never actually "called" and no stamp was put upon the same. That the plaintiff in error, Charles H. Treat, United States collector of internal revenue, demanded of the defendant in error, Stephen V. White, the sum of six hundred and four dollars, which sum was the value of 30,200 internal-revenue stamps of the denomination of two cents each.

This sum of six hundred and four dollars was paid by the defendant in error, Stephen V. White, under protest. Subsequently the defendant in error demanded the return of the said six hundred and four dollars, but the demand was refused.

Upon the facts set forth the question of law, concerning which this court desires the instruction of the Supreme Court for its proper decision, is:

Is the above memorandum in writing, designated as Exhibit A, an "Agreement to sell" under the provisions of section 25, Schedule A, act of Congress approved June 13th, 1898, and, as such, taxable?

WM. J. WALLACE,
Circuit Judge.
N. SHIPMAN,
Circuit Judge.

3 (Indorsed:) Suit No. . U. S. circuit court of appeals for the second circuit. Charles H. Treat, U. S. collector of internal revenue, plaintiff in error, vs. Stephen V. White, defendant in error. Certificate for instructions. Henry L. Burnett, United States attorney, attorney for collector. United States circuit court of appeals, second circuit. Filed Mar. 16, 1900. William Parkin, clerk.

4 In the supreme court of the State of New York.

STEPHEN V. WHITE, PLAINTIFF,
vs.
CHARLES H. TREAT, U. S. COLLECTOR of internal revenue, defendant.

Trial desired in New York County.

To the supreme court of the State of New York:

The plaintiff above named claims of the defendant the sum of six hundred and four dollars, with interest from July 12th, 1899, and for cause of said claim plaintiff states:

1st. That from July 1st, 1898, to said July 12th, 1899, he was a member of the New York Stock Exchange, doing business at 7 Wall street, New York City, and that in the course of his business he sold certain options or offers to sell stocks, aggregating in all 30,200 shares of the par value of $3,020,000, which said offers were in all instances made at prices above the market price and were all limited to short periods from their respective dates, and none of them was ever accepted by the respective holders thereof, nor was a sale of any of said stock ever made. For reference, a copy is given of one of said options or offers to sell, the said copy being hereto attached as Exhibit A, all the other papers thus sold being of like tenor and effect, except only as to difference in date, time, price, and the stock offered.

5 2nd. The Commissioner of Internal Revenue, under the laws of the United States, took cognizance of said transactions, and wrongfully and illegally held that such offers to sell were agreements to sell within the meaning of section 25, Schedule A, public laws 133,

laws of 1898, approved June 13th, 1898, and should have had adhesive revenue stamps at the rate of 2 cents each 100 dollars of par value, or in all $604.00, and under his direction this plaintiff was duly assessed for said sum.

3rd. That the defendant is U. S. collector of internal revenue for the second district of New York, and acting under the directions of said Commissioner of Internal Revenue the defendant demanded payment of said sum under threat of collecting the same by law.

4th. This plaintiff protested against the said assessment as wrongful and illegal, but being compelled to yield to the sovereign demand of the U. S. Government he paid said sum under protest to said defendant, as such collector, and immediately appealed to the U. S. Commissioner of Internal Revenue at Washington to have the said tax refunded, as was his right and duty under the U. S. law in such case made and provided, which appeal and demand was denied.

5th. Plaintiff avers that no tax was imposed upon said offers to sell under the laws of the United States, and that said sum was wrongfully obtained from plaintiff by said false construction of law, and is due and owing plaintiff, with interest.

6 Wherefore, plaintiff demands judgment against defendant for said six hundred and four dollars, with interest, and costs of this suit.

S. V. WHITE,
Plaintiff in person, 7 Wall St.

STATE OF NEW YORK, *County of New York, ss:*

Stephen V. White, being duly sworn, says that he is plaintiff in this action; that he is acquainted with the contents of the foregoing complaint, and that the same is true to his knowledge, except as to those matters therein stated to be alleged upon information and belief; and that as to those matters he believes it to be true.

S. V. WHITE.

Sworn to before me this 18th day of September, 1899.

JAMES WALSH,
Notary Public, Kings County, Cert. filed N. Y. Co.

7 EXHIBIT A.

NEW YORK, *May 18th, 1899.*

For value received the bearer may call on me on one day's notice, except last day, when notice is not required, one hundred shares of the common stock of the American Sugar Refining Company at one hundred and seventy-five per cent, any time in fifteen days from date.

All dividends for which transfer books close during said time go with the stock.

Expires June 2nd, 1899, 3 p. m.

(Signed) S. V. WHITE.

8 United States circuit court, southern district of New York.

STEPHEN V. WHITE, PLAINTIFF,
vs.
CHARLES H. TREAT, UNITED STATES COLLECTOR of internal revenue, defendant.

The defendant above named, by his attorney, Henry L. Burnett, U. S. attorney for the southern district of New York, for answer to the complaint of the plaintiff herein alleges on information and belief:

First. Answering the first paragraph of the plaintiff's complaint, defendant alleges that he has no knowledge or information sufficient to form a belief, and therefore denies the same.

Second. Defendant denies that the Commissioner of Internal Revenue under the laws of the United States took cognizance of certain transactions set forth in the first paragraph of the complaint and wrongfully and illegally held that certain offers to sell were agreements to sell, but on the contrary defendant alleges that such offers to sell were in truth and in fact agreements to sell within the meaning of section 25, Schedule "A," of the act of Congress approved June 13th, 1898.

Third. Defendant admits that he is United States collector of
9 internal revenue for the second district of New York, and at all the times herein mentioned was acting under the direction of the United States Commissioner of Internal Revenue.

Fourth. Defendant denies that no tax was imposed upon the said offers to sell under the laws of the United States; and defendant further denies that the said sum of $604, mentioned in the second paragraph of the complaint, was wrongfully obtained from plaintiff by a false construction of law; and defendant further denies that the said sum, or any other sum, is due and owing to plaintiff with interest.

Wherefore defendant demands judgment that the complaint be dismissed, together with the costs and disbursements of this action.

(S'g'd) HENRY L. BURNETT,
United States Attorney and Attorney for Defendant.

Office and post-office address, room 50, post-office building, New York City.

10 STATE OF NEW YORK,
City and County of New York, ss:

Charles H. Treat, being duly sworn, deposes and says that he is the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

(S'g'd) CHAS. H. TREAT.

Sworn to before me this 2nd day of November, 1899.

[SEAL.] FREDERICK L. CAMPBELL,
Notary Public, Kings County.
Certificate filed in N. Y. Co.

11 United States of America, second circuit.

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate in the case entitled Charles H. Treat, U. S. collector of internal revenue, plaintiff in error, vs. Stephen V. White, defendant in error, was duly filed and entered of record in my office by order of said court on the 16th day of March, nineteen hundred, and as directed by said court the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said United States circuit court of appeals for the second circuit, at the city of New York, in the southern district of New York, in the State of New York, this 16th day of March, in the year of our Lord nineteen hundred, and of the independence of the United States the one hundred and twenty-fourth.

[SEAL.] WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[10 cent internal revenue stamp.]

12 (Indorsed:) United States circuit court of appeals, second circuit. Chas. H. Treat v. Stephen V. White. Certificate for instructions.

(Indorsement on cover:) Certificate. File No. 17680. U. S. C. C. of appeals, 2nd circuit. Term No., 566. Charles H. Treat, U. S. collector of internal revenue, plaintiff in error, vs. Stephen V. White. Filed March 19, 1900. Office Supreme Court of U. S. Received Mar. 17, 1900.

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No. 227.

Br. of Atty. Gen'l

Office Supreme Court U. S.
FILED
MAR 29 1901
JAMES H. McKENNEY,
Clerk.

Filed Mar. 29, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

CHARLES H. TREAT, UNITED STATES collector of internal revenue, plaintiff in error,
v.
STEPHEN V. WHITE.
} No. 227.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

JAMES M. BECK,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

CHARLES H. TREAT, UNITED STATES collector of internal revenue, plaintiff in error,
v.
STEPHEN V. WHITE.

No. 227.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT AND ARGUMENT.

This is a certificate for instructions from the circuit court of appeals for the second circuit in an action originally brought in the New York supreme court by Stephen V. White against Charles H. Treat, collector of internal revenue, and removed by the said collector to the circuit court of the United States for the southern district of New York. The action was brought to recover the sum of $604, which the plaintiff claimed had been unlawfully exacted by the said collector. Judgment was entered in favor of the plaintiff in the circuit court and was appealed to the circuit court

of appeals, which certified the case to this court for instructions.

According to the agreed state of facts, the plaintiff was a stock broker on the New York Stock Exchange and in the course of business executed various agreements, which, in substance, were as follows:

> NEW YORK, *May 18th, 1899.*
>
> For value received the bearer may call on me on one day's notice, except last day, when notice is not required, one hundred shares of the common stock of the American Sugar Refining Company, at one hundred and seventy-five per cent any time in fifteen days from date. All dividends, for which transfer books close during said time, go with the stock.
>
> Expires June 2, 1899, 3 p. m.
>
> S. V. WHITE.

These agreements cover the sale of 30,200 shares of stock, and the collector demanded of the plaintiff that he attach to said agreements 30,200 internal-revenue stamps of the denomination of 2 cents each. This was done under protest, and the present suit is to recover the amount of said duties.

The question is, therefore, one of statutory construction. The duties were exacted under Schedule A of the war revenue act, which provides for stamp taxes, and which, *inter alia*, provides as follows:

> "On all sales, or *agreements to sell*, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any association, company, or corporation, whether made upon or

shown by the books of the association, company, or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, *whether entitling the holder in any manner to the benefit of such stock, or to secure the future payment of money or for the future transfer of any stock*, on each hundred dollars of face value or fraction thereof, two cents: *Provided*, That in case of sale where the evidence of transfer is shown only by the books of the company the stamp shall be placed upon such books; and where the change of ownership is by transfer certificate the stamp shall be placed upon the certificate; *and in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed:* and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers."

The agreement in question is what is commonly known as a "call," and is a familiar method whereby millions of shares of stock are bought and sold in the New York and other stock exchanges. "Puts" and "calls" ("puts" being agreements to buy as distinguished from the present agreement, technically known as a "call," which is an agreement to sell) have been used for many years in transactions aggregating many millions of dollars for the buying and selling of stocks,

and when Congress enacted the war revenue act it is to be presumed that they knew of this method of dealing in stocks.

Was it included within the provisions above quoted? In determining this it should be remembered that the act of Congress was, as its title imports, "to provide ways and means to meet war expenditures," and, as at the time of its enactment it could not be determined whether the war which had then commenced would be long or short, it is to be presumed that in making purchases and sales of stock a source of revenue, Congress did not intend to ignore or exclude one of the most common methods whereby such purchases and sales are made. No reason can be suggested why such agreements to sell were to be exempted from the burdens of taxation when absolute transfers of stocks were subjected to such taxation. Had the question now suggested been raised in Congress at the time of the passage of the act, there can be little question as to the purpose of Congress.

Is such intention reasonably within the language of the act itself?

In construing the act, no intention must be imputed to Congress to make refined and subtle distinctions as to what is or is not an agreement to sell. Congress was not indulging in the refined distinctions of the civil law, which divided sales into consensual (those requiring consent), synallagmatic (those containing reciprocal engagements), and commutative (those requiring the interchange of supposed equivalents). If they were

making any distinctions, it was that suggested by the robust common sense of the common law, which divided sales into those by which title immediately passed, and those which were executory in nature, by which the title was to pass *in futuro*. This distinction they indicated by distinguishing in the war-revenue act between "sales" and "agreements to sell." The war-revenue act was intended not alone for judges and lawyers, but for the masses of the people, upon whose shoulders the burdens of taxation were laid, and who were obliged to understand its provisions, and the language that was used was, so far as practicable, words of common speech, and they must therefore be given the common and ordinary interpretation which they would generally receive. Whether these agreements were "sales" may be a debatable question, for it can be argued with some plausibility that Congress by the word "sales" meant an absolute and unconditional sale, in which the title immediately passed from the seller to the buyer. If the agreement in question be not technically or even popularly a sale, it is nevertheless an agreement to sell. The act provides for a tax on agreements to sell, or memoranda of sales, "whether made upon or shown by the books of the association, company, or corporation, or by any assignment in blank, *or by any delivery*, or by any paper or agreement or memorandum or other evidence of transfer or sale whether entitling the holder in any manner to the benefit of such stock, or to secure the future payment of money *or for the future transfer of any stock*." The proviso of the act makes the meaning

even clearer, for it provides "that in case of sale where the evidence of transfer is shown only by the books of the company the stamp shall be placed upon such books; and where the change of ownership is by transfer certificate the stamp shall be placed upon the certificate; *and in cases of agreement to sell* or where the transfer is by delivery of the certificate assigned in blank there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed; and every bill or memorandum of sale or *agreement to sell* before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers." This clearly indicates that Congress did not intend that transactions in stocks or bonds, where there was no formal transfer or assignment to convey title, should be exempted. It required in such cases of agreement to sell a memorandum thereof, and the present agreement meets in all respects the requirements of the act, for it shows "the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers."

If the agreement to sell such bonds or stock, which are assigned in blank or transferable by mere delivery, be not subject to the tax in question, the inequality necessarily results that sales of bonds and stocks requiring no formal transfer upon the books, or issuance of a new certificate, and which comprise the larger part of stock transactions, are exempted, while the exceptional cases, where the stock is formally transferred by the seller to the buyer, are taxed.

The last sentence above quoted is also significant. Omitting the intervening sentences, it would read as follows:

> Sales, or *agreements to sell*, or memoranda of sales, * * * whether made upon or shown * * * by any paper or agreement or memorandum or other evidence of transfer or sale whether entitling the holder in any manner to the benefit of such stock, * * * *or for the future transfer of any stock.*

This brings the present agreement literally within the provision. It is clearly an "agreement to sell, * * * entitling the holder to the benefit of the stock," or an "*agreement to sell* * * * *for the future transfer of any stock.*" In the present agreement Mr. White agrees to sell on demand, within a stipulated period, a specified amount of stock at a specified price, and the man with whom he makes this agreement pays him a valuable consideration for such agreement. If the seller should refuse to deliver the stock on demand, the holder has a clear action for a breach of contract. How could this be, if it were not an agreement to sell? It is true that there is no reciprocal right on the part of White to compel the holder to take the stock within fifteen days. The agreement is as to the vendor an absolute agreement to sell the stock, to be consummated on the demand of the vendee within a stipulated period. On the part of the vendee it is an optional right to demand, but because it is an option as to the vendee, it is not an option as to the vendor. *He must*

sell on demand. No right of rescission remains with him.

The question, therefore, in a nut shell, is this: Does an agreement to sell become less an agreement to sell because there is no reciprocal agreement to buy?

To the casuist, splitting legal hairs "twixt north and northwest side," it might seem that unless there was a reciprocal obligation to sell and buy there was no agreement to sell. But this is not true in the common acceptance of the term "agreement to sell."

In this connection we may allude to the opinion of Judge Lacomb in the court below. (100 Fed. Rep., 290.) It commences with an accurate analysis of what is a "sale," and proceeds to show that the words "sale," "contract of sale," and "agreement *of* sale" are synonymous terms, and that they do not exist "until someone accepts the offer by agreeing to buy." To this reasoning the Government does not dissent. Technically the instruments in question are not sales.

The learned judge properly distinguishes between an "agreement *of* sale" and an "agreement *to* sell," and he admits that literally the instrument in question is "an agreement to sell." He says:

> It is an agreement, and manifestly an "agreement to sell." It may be referred to as an "offer," or an "option," or a "call," or what not, but it is susceptible of no more exact definition than "an agreement to sell." Inasmuch, therefore, as the statute requires stamps to be affixed "on all sales, or agreements to sell," it would seem that these "calls" are within its provisions.

Having thus decided that Congress has aptly brought the instrument in question within the provisions of the act, the learned judge nullifies the act by assuming that "statutes are frequently prepared under circumstances which preclude the careful weighing of words and the nice discrimination of technical meanings which the text writer may avail of," and he proceeds to suggest that the expression "agreement *to* sell" is synonymous with "sale." After conceding that the meaning of Congress must be "ascertained from the statute itself," he departs from his own rule of construction by assuming that Congress not only did not mean what it did say, but also did mean what it did not say, and he bases this assumption upon another assumption that words in the following and independent paragraph of the bill also show that Congress has not used language with nice discrimination. I submit that the opposite conclusion is justified, for, in the next paragraph, where sales of products or merchandise are taxed, Congress uses the phrase "sale, agreement *of* sale, or agreement *to* sell." It is obvious, therefore, that Congress did discriminate between an agreement of sale and an agreement to sell; and when, therefore, in the preceding paragraph, which is now under consideration, it used the words "agreement to sell," the deduction is reasonable that the expression was used to distinguish it from an "agreement of sale." Judge Lacombe, however, assumes that all three terms in the latter paragraph are used synonymously, and therefore

concludes that in the preceding paragraph the same tautology exists. He says, as to the latter paragraph:

> This shows an acquaintance with the three terms, but does not necessarily imply that the two latter are used in contradistinction to each other. Having used two terms ("sale" and "agreement of sale") whose meaning is identical, the presence of the third term does not necessarily import an intention to use it with a different meaning. Undoubtedly it may be used, and is often used, in common, everyday speech, with sufficient looseness to cover an agreement of sale where delivery and payment are both postponed.

To this I reply that while the use of three different terms may not "necessarily imply that the two latter are used in contradistinction to each other," yet the fair presumption is that each term was used to convey its peculiar and appropriate meaning, whereas the learned judge is apparently of opinion that they are presumably used synonymously, even though they are not synonymous expressions. Having conceded that the use of these expressions showed "an acquaintance with the three terms" on the part of Congress, and having conceded that an agreement to sell can only be regarded as a sale in the "looseness" of "common, everyday speech," he concludes that Congress, notwithstanding its knowledge of the distinctions between the expressions, yet used the expressions without regard to such distinctions, and with no other apparent purpose than to multiply words without adding to the

meaning. I submit that such a conclusion is unwarranted.

Judge Lacombe further argues that "an agreement to sell" would not secure "a future transfer of the stock," and therefore an "agreement to sell" must mean an "agreement of sale." He says that the agreement under consideration "might secure a future offer, which would itself secure nothing until by an acceptance *an entirely new contract* was created." I submit that no "entirely new contract" is necessary under the agreement in dispute. The holder demands his hundred shares of stock and tenders payment. The stock, assigned in blank, is handed to him. The transaction is complete. No new contract, written or oral, is made. That which is done is simply the execution of the prior contract.

In further support of his opinion, the learned judge finally suggests that "if Congress has used the term 'agreement to sell' in its strict legal sense, and has thereon imposed a tax calculated at 2 cents per hundred dollars face value of the stock referred to therein, there is a double tax on a single transfer of stock. When the holder of the agreement to sell requires the other party to offer the stock in conformity to its terms and then accepts the offer, there is a meeting of their minds constituting an agreement *of* sale, or a sale—a contract independent of and different from the agreement *to* sell—and which by the express terms of the act is itself subject to stamp tax." The answer to this is that the Treasury Department ruled (Treas. Dec. 20093) that

when an agreement to sell was completed by a transfer of the stock, no further tax would become due when the tax had already been paid upon the agreement to sell. The Government has not sought to impose double taxation. It assumes that an agreement to sell, which is consummated by an actual transfer, is liable to but one tax, but it does contend that an agreement to sell is subject to the tax, even though the delivery is to take place in the future and is conditional as to the vendee, and even though there be no actual delivery at all.

The learned judge also suggests as a final reason for his decision that, as the question is "extremely doubtful," the duty should not be imposed. I submit that the doubt is fanciful and requires for its support the elimination of the expression "agreement to sell" by arbitrary construction. The circuit judge having held that this agreement was aptly defined as an "agreement to sell," and the act having specifically imposed a tax upon an "agreement to sell" as distinguished from a "sale," the judgment should have been in favor of the defendant, and the circuit court of appeals should be so instructed.

Respectfully submitted.

JAMES M. BECK,
Assistant Attorney-General.

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JAMES H. McKENNEY,
Clerk.

No. 227.

Brf. of White D. C. Pro se.

Filed April 6, 1901.

CERTIFICATE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 227.

CHARLES H. TREAT, U. S. COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR.

VS.

STEPHEN V. WHITE, DEFENDANT IN ERROR.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MARCH 19, 1900.

(17680.)

ARGUMENT OF S. V. WHITE, DEFENDANT IN ERROR IN PERSON.

1 United States Supreme Court.

October Term, 1900. No. 227.

CHARLES H. TREAT, UNITED STATES COLLECTOR of internal revenue, *Plaintiff in error*,
vs.
STEPHEN V. WHITE,
Defendant in error.

BRIEF OF DEFENDANT IN ERROR.

2 As will be seen by the record in this case, page 2, this cause is before this court on a request made by the circuit court of appeals for the second circuit, desiring instruction of the supreme court for its proper decision as to whether a "call" in these words:

NEW YORK, *May* 18, 1899.

For value received the bearer may call on me on one day's notice, except last day, when notice is not required, for one hundred shares of the common stock of the American Sugar Refining Company, at one hundred and seventy-five per cent. any time in fifteen days from date. All dividends, for which transfer books close during said time, go with the stock. Expires June 2, 1899, 3 p. m.

3 (Signed) S. V. WHITE.

is an "agreement to sell" under the provisions of section 25, Schedule A, act of Congress approved June 13th, 1898, and as such, taxable.

The defendant in error contends that it is not taxable, and in support thereof he calls the attention of the supreme court to the following:

In applying the rules of law covering the construction of this statute the attention of the court is called to the very severely penal provisions of the law. In this same section of the law we find this provision:

4 "Any person or persons liable to pay the tax as herein provided .....who shall make any such sale, or who shall in "pursuance of any such sale, deliver any such stock, or evidence "of the sale of any such stock or bill or memorandum thereof, "as herein required, without having the proper stamps affixed "thereto, with intent to evade the foregoing provisions shall be "deemed guilty of a misdemeanor, and upon conviction thereof

5 "shall pay a fine of not less than five hundred nor more than
"one thousand dollars, or be imprisoned not more than six
"months, or both, at the discretion of the court."

and the rule at once obtains that every penal statute must be strictly construed.

But this law could not be held to require stamps upon an option to sell stock, if, instead of being a penal statute, it were a statute giving enlarged, equitable jurisdiction for the aid of an orphan asylum.

If the same is taxable it is under the provision of section 25, Schedule A, Stamp Taxes, parts of the 7th to the 17th lines, which
6 are in these words:

"On all sales or agreements to sell, or memoranda of sales, or
"deliveries or transfer of shares, or certificates of stock in any
"corporation on each hundred dollars of face value,
"or fraction thereof, two cents."

The rule in regard to the construction of all acts which the courts have constantly acted upon, "is to take the words in their ordinary, grammatical sense, unless such a construction would be obviously repugnant to the intention of the framers of the instrument or would
7 lead to some other inconvenience or absurdity." (Sedgwick Construction of Statutory Law, page 220, quoting Parke, B.)

The supreme court of New York in Walter vs. Harris, 20th Wendell, 555, held "That the current of authority at the present day is in favor of reading statutes according to the natural and most obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending their operation."

Arriving at the natural every-day meaning of "agreement to sell," we look at the definition as given in the dictionaries, and, referring to the Standard Dictionary, it defines agreement in law: First, mutual
8 assent; second, a contract. So that, in order to constitute an agreement to sell, there must be the *mutual assent* of a seller and a buyer, or, taking the word "contract," their must be a drawing together (*Latin, contraho—contractum*), or assenting to the purchase by a purchaser.

Applying these principles to the case in point it must be borne in mind that the definition of a "call" was known not only to lawyers,

9 but to lexicographers, when this law was passed, as well as was the definition of a promissory note. Webster, in his unabridged dictionary, more than fifteen years ago printed the following definition of a "call": "The privilege to demand the delivery of stock, grain, or any commodity at a fixed price, at or within a certain time agreed on."

The Standard Dictionary, published by Funk & Wagnall in 1896, gives the following definition: (No. 9) "A contract conveying, in consideration of money paid, the privilege of calling for (demanding) within a designated period, and agreeing to deliver on demand, some article named, as wheat or cotton, on payment for the same at a stipulated rate or price: the opposite of put."

10 The Century Dictionary, published on May 1, 1889, gives the following: "In the Stock Exchange, the privilege secured by contract and for a consideration of claiming or demanding and receiving a certain number of shares of some particular stock at a specified price, and within a stated period.

The following is a copy of the form commonly used:

NEW YORK, [*Name the date*]

"For value received, the bearer may call on me for [*so many*] of the common stock of the [*Name the Stock*] at [*Name the Price*] per cent. any time within [*so many*] days from date. The bearer is entitled to all dividends or extra dividends declared during the time.

11 Treatises had been written upon "Calls." In Ray on Contractual Limitations; pages 43 to 47, inclusive, are devoted to a discussion of "puts" and "calls," and "straddles." Cases are cited almost without number in reference to enforcing specific peformance, or to declaring them null and void, as coming under the Gambling Law.

Illinois had passed a special statute prohibiting them in that state, or declaring them to be gambling contracts, and therefore void; but there is nowhere any pretense in any book, that such options are agreements to sell until the buyer has, on his own behalf, agreed to buy. Such options, "puts," "calls" and "straddles" are discussed at length, with the rulings upon
12 them, in Dos Passos on Stock Brokers, pages 444 to 455, inclusive. (See also Dewey on contracts for future delivery, published in 1886, page 27, and elsewhere in said volume.) The authorities upon options and definitions from dictionaries are only cited to show that calls were not only known in the trade, but were known in law, and if the legislative body desired their taxation they would have stated so fully as they stated a tax on deeds or promissory notes.

13 I cite the dictionaries, and the treatises, and statutes, and decisions defining "calls" to show affirmatively that there could be no excuse for the legislative body which framed this law for omitting their mention, if it had desired to tax them. To show the care exercised by the legislative body I cite the following:

Premising that there are no two written instruments more nearly interchangeable in meaning than are checks and drafts, yet Congress enacted that a "bank check, draft, or order for the payment of any sum of money" should bear a two cent stamp, showing the care with which they framed the law so that there should be no misconstruction.

14 On the general question as to the spirit in which laws imposing revenue duties are to be construed, reference is made to the language of Mr. Justice Story in Adams vs. Bancroft, Third Sumner, page 336, in which he says:

> "Laws imposing duties are never construed beyond the natural "import of the language: and duties are never imposed upon "the citizen upon doubtful interpretations; for every duty im- "poses a burden on the public at large, and is construed strictly, "and must be made out in a clear and determinate manner from "the language of the statute."

15 The interpretation of statutes in respect to adhesive stamps has not been large in this country, because we have for so short a period of our national history imposed taxes by that method. But this Court in United States against Isham, 17 Wall., 503, said that

> In cases where there is any doubt as to the liability of an instrument to taxation the construction is in favor of the exemption, because a tax cannot be imposed without clear and express words for that purpose.

The case of Girr vs. Scudd, cited *infra*, is cited and followed by this Court in U. S. vs. Isham, in which Pollock, C. B., is quoted as
16 saying, "A tax cannot be imposed without clear and expressed words for that purpose."

This court follows the English authority in Williams vs. Jarrett, 5; Barnewall vs. Adolphus, 32, and Whistler vs. Forster, 14, Common Bench, 257,—prohibiting a court from inquiring *de hors* the instrument as to its character even when it has taken its form to avoid payment of a stamp tax.

17 Unless this Court reverses that ruling there is absolutely not a shadow of argument in behalf of the contention of the Internal Revenue Department in this matter.

The very strongest contention which the learned Attorney General and the Internal Revenue Department make for this case is that Congress, when it enacted the War Revenue Tax in view of the exigencies which might be upon the country in case of a protracted war, would naturally have provided for a stamp tax upon this class of dealing in stocks, and as such papers are not taxed in any other way it must have been the intention of Congress to tax them in this way. But there is no word in the Statute which imposes such tax, and that
18 class of speculative reasoning might put a stamp tax on every letter that a man wrote, as the government would want to insure a large income for war purposes, and nothing would be so efficient as a tax of one-tenth of one cent on every sheet of paper used in letter-writing. The answer to both propositions is, perhaps Congress ought to have done so but it did not.

Stress is laid by the Attorney General in his brief on the fact that the learned Judge in the opinion which he filed (Federal Reporter, 100 page), used the expression that the call under consideration is an "agreement to sell." That statement, in the opinion does not bind either the defendant in error or this court, and is another instance of a court making a correct decision after giving an erroneous
19 argument leading up to it. The fact remains that no agreement to sell anything is ever made in which some purchaser does not agree to buy.

In England, laws regulating stamp duties have been the subject of construction for a long period of years. In Commissioners vs. Angus & Co., Limited, 23, Q. B. D., 579, the court said:

> "Acts of Parliament imposing stamp duties are to be con-
> "strued according to the plain and ordinary meaning of the
> "words used as it appears from the words themselves, as if a
> "means can be found of carrying out a transaction without in-
> "curring liability to stamp duty, the subject is justified in adopt-
> "ing it."

20

Again in Gurr vs. Scudd, Pollock, C.B., 11 Exchequer Rep. 190, held that:

> "If there is any doubt as to the meaning of the words, they
> "ought to be considered in favor of the subject, because a tax
> "cannot be imposed without clear and express words for that
> "purpose."

21 Perhaps there is no better argument to be used to show the fallacy of this ruling than the *reductio ad absurdum.* The court will not seek for a special provision for taking money out of Wall Street brokers, but will deal even-handed justice to all cases similar in principle to the case in point.

Options are not alone given for the sale of personal property or stocks, but it is almost the uniform rule in large real estate transactions, involving millions of dollars, for the enterprising broker who contemplates purchase to secure an option at a given price for an agreed time, in which he may bring together capitalists with money, who may accept an offer with a certainty that their acceptance will
22 be consummated by a transfer of the real estate.

If the construction claimed applies to brokers in stocks, then the construction claimed will apply to dealers in real estate, and whenever a man trading in real estate offers an option on a valuable property at $2,000,000, as is done monthly, if not daily in New York City, then he commits a misdemeanor unless he places upon the option which he signs stamps for $2,000, to cover the possible sale which may result from such option. The utter nonsense of adjudging an agreement to sell to cover options, which would practically put an embargo upon the purchase and sale of all commodities and realty, needs only to be stated to make the refutation of such a con-
23 struction complete.

Another absurdity is legitimately deducible from this ruling of the Commissioner of Internal Revenue. With great magnanimity he has held that if the seller of an option has stamped the option, he is not required to put the stamp also upon the memorandum of sale when such sale is consummated. If that same rule is to apply, then we shall have as a necessary corollary, the following condition:

The promulgation of a rule that, where an option on real estate has been stamped with the necessary $2,000, it will not be necessary to stamp the deed. And so a deed unstamped and upon its face *prima facie* void, must be recorded by a public officer who is express-
24 ly prohibited by law from recording a deed which does not bear the necessary revenue stamps.

The zeal of the Internal Department in collecting revenue from Wall Street brokers is shown in the construction which was put upon "puts" or offers to buy stocks as promulgated by the Internal Revenue Department in Document No. 20,093, date, September 24th, 1898:

25 "It appears to be the intention of the law to include in its "imposition of tax in such cases the agreements to sell and for "the future transfer as well as the actual sales and transfers of "stock and to include such agreements as taxable whether or "not they are afterwards completed. The 'call' privileges issued "by the broker submitting the blank forms are undoubtedly "agreements to sell stock bearing name upon demand of the "bearer of the privileges, while the 'put' comes also as plainly "within the terms of the law declaring any paper, agreement or "memorandum for the future transfer of stock subject to taxa-"tion. If the transaction in any case is completed by a transfer "of the stock, no further tax will be due, the tax having already
26 "been paid upon the agreements made for such transfer."

The department thus included as taxable an offer to purchase as fully as a completed agreement to sell.

The construction of a Statute imposing a tax, to be warranted in law, must be one which will apply either for or against the tax, as the language of the Statute may be applicable in respect to the subject matter under discussion. Now, suppose that the wording of the Statute should have directed the stamp tax in these words:

27 Contracts or papers referring to the purchase and sale of stocks shall each bear a stamp tax of two cents per hundred dollars par value, *except agreements to sell such stocks, which shall not be taxed.*

Would the Internal Revenue Department or the learned Attorney General contend with that wording that they could not tax "calls" because these were agreements to sell?

I think the acumen of either or both officers would be sufficient to determine that these were not agreements to sell, but were offers to sell, inchoate, and requiring the assent of a purchaser to make them agreements to sell. But should not the rule on taxation of agreements to sell work both ways, either for or against the government? And if not, why not?

28 According to the agreed facts in this case, out of options issued on stock of the par value of $3,500,000 sales were consummated by the acceptance of the offer on the part of purchasers in only $550,000, or about one seventh (1/7th) of the options issued. The construction claimed by the Internal Revenue Department, therefore, would have compelled seven (7) times the amount of tax which would have been necessary upon the consummated sales of stocks under such "calls."

29 What one really sells in issuing a "call" is a contract conveying a a privilege to buy, and thereby to complete a sale, but there is no contract to sell because there is no mutual assent and there must be a purchaser whenever there is a seller of stocks. This seems to me to be the easiest statute construed of any I ever saw, and I cannot but expect the supreme court to direct the circuit court of appeals to follow the ruling made by the judge of the circuit court for the second judicial district.

Respectfully submitted,

S. V. WHITE,

30 IN PERSON.

OFFICE SUPREME COURT OF U.S.
RECEIVED
MAY 15 1901

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 227.

CHARLES H. TREAT, U. S. COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

vs.

STEPHEN V. WHITE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MARCH 19, 1900.

Petition for (17680.) rehearing

~~ARGUMENT~~ OF S. V. WHITE, DEFENDANT IN ERROR IN PERSON.

1 Supreme Court of the United States.

October Term, 1900. No. 227.

CHARLES H. TREAT, UNITED STATES COLLECTOR of internal revenue, *Plaintiff in error*,
vs.
STEPHEN V. WHITE,
Defendant in error.

PETITION FOR REHEARING.

2 To the Honorable Judges of the Supreme Court of the United States:

Upon examining the opinion of this court in the above entitled cause, filed April 29, 1901, it seems to the defendant in error that it is his duty, most modestly and deferentially, to present to the court a phase of this case which seems to him to have been not fully recognized in said opinion. He feels that the decision in this case overrules the law as expressly stated by Mr. Justice Hunt in the case of United States vs. Isham, 17 Wall, 504, the statement of which is in these words: "The words of the statute are to be taken in the sense in which they will be understood by that public in which they are to take effect." Adopting the direct speech and speaking in the
3 first person, I feel that this expression of the law by Judge Hunt is a continuance of the current of decisions as laid down by the courts in England through many years.

In my presentation of the case before this honorable court I was, I am sure, too confident in regard to the construction of the word "agreement," as to which it seemed to me, until I was corrected by the decision of this honorable court, clear, that an agreement could not be made except by the mutual assent of two minds, and I argued upon that line, because I felt so confident that, THAT would be sufficient. The opinion of this court has settled that question, and to it I yield most unreservedly. But the recognition of the words of Mr. Justice Hunt in United
4 States vs. Isham, *supra*, that "the words of the statute are to be taken in the sense in which they will be understood by that public in which they are to take effect," is, it seems to me, to make a clear distinction between what a learned judge sitting in the deliberations of a consultation room of such a tribunal as this, might decide was involved in an obscure phrase, and what ordinary

men engaged in business would understand a statute to mean, and that the test is, what such understanding would be by conscientious and sensible men. The courts have constantly avoided setting traps or permitting traps to be set into which honest men in the discharge of their business may fall through error. They have said in the construction of the statutes, to the legislative body, "you must state your wording not only so a lawyer learned in the technicalities and abstruseness of the law may understand it, but you must state it in such a manner that the men who are not learned in the law, but pursuing their avocations, can arrive at a correct conclusion." If there is any doubt upon the question, the courts have said, and I will cite the instances a little later on, then the statute must be construed against the government. I am reminded of a distinction said to have been made by a distinguished chef when an assistant appealed to him as to whether an egg should be used which he had decided was good. The retort of the chef was, "If you have to study the quality of the egg, it is a doubtful egg, and a doubtful egg must never be used." The courts have, in the decisions to which I have referred, as it seems to me, said to the lawmakers, "You must make your law so that there can be no doubt about it, because doubtful constructions must be excluded."

Now, having stated this proposition of law, I apply it to the case in point, and that I may fairly and legitimately aid the court in coming to a correct conclusion as to how questions of this kind are understood "by that public in which they are to take effect," I have prepared, and file with this application, the affidavit of Brayton Ives, thirty-three years a member of the stock exchange, and president of the stock exchange for two years; of J. Edward Simmons, for eighteen years a member of the stock exchange, and two years its president; and the affidavit of Honorable Russell Sage, veteran and specialist in puts and calls and privileges of that character, in which they each say they never heard a call spoken of as an agreement to sell. Mr. Ives is president of the Metropolitan Trust Company. Mr. Simmons is president of the Fourth National Bank. Mr. Sage's reputation is coextensive with the financial world. In addition, I have given my own declaration as a busines man, and an officer of this court, showing the same condition, and upon these statements the conclusion is irresistible that no person "in that public in which this law was to take effect" would ever have applied the words "agreement to sell stocks" to the paper in controversy. So much for the technical understand-

9 ing among the members of the stock exchange, and those to whom alone this question is a matter of practical construction and application. Now, to show the inherent doubt upon the question itself, I would state that this case is a case with a history. I wrote a letter to the commissioner of internal revenue of the United States, in which I told him that I would come down here and present the arguments against taxation of puts and calls, and agree to be governed by the opinion of the attorney general as fully as though he himself were a court of competent and final jurisdiction to hear and determine the entire question in controversy, provided only I might be fully heard on the question. That offer was accepted, and I came. I went before the assistant attorney general, Colonel
10 Boyd, since appointed judge of the district court of the United States for one of the districts in the state of North Carolina. He heard my argument and decided without a minute's hesitation that neither puts nor calls were taxable. He wrote an opinion and sent it to the attorney general, to this effect, parts of which were read to me. Mr. Attorney General Griggs, then in office, differed from his opinion as to calls and gave directions that it should be decided differently, and this was done when I was not present, by a law officer before whom I had not been heard. It was conceded by the attorney general and the assistant attorney general that I was not bound by that order, and that I could therefore in honor proceed with the
11 determination of this case before the court. Here was a man learned in the law, standing free from bias, who decided that the paper is not taxable. If the assistant attorney general of the United States did so decide, can it be proper under the rules of law established and enunciated in United States vs. Isham, supra, that the men "who are doing business" should know more of the intricacies of the law than the attorney general? When suit was brought that very eminent judge, Mr. Justice Lacombe, of the circuit court of the United States for the second judicial circuit decided in my favor. I cite these cases not to wrestle with the view of this court, nor in contention with its opinion, but as bringing this case within the rule of law laid down, to wit, that *where a case is of doubtful construction the decision of the*
12 *court must be against the government*, although the court might be compelled to differ as to some abstruse question involved.

To show the soundness of the decision in United States vs. Isham, *supra*, I lay special emphasis upon the case of Commissioners vs. Angus, 23 Q. B. D. 579, where the court said:

13 "Acts of Parliament imposing stamp duties are to be construed
"according to the plain and ordinary meaning of the words used
"as it appears from the words themselves, as if a means *can be*
"*found* of carrying out a transaction without incurring liability
"to stamp duty, *the subject is justified in adopting it.*"

And the words of Pollock, C. B., 11 Exchequer Rep. 190, as follows:

"If there is any doubt as to the meaning of the words, they
"ought to be considered in favor of the subject, because a tax
"cannot be imposed *without clear and express words for that*
"*purpose.*"

14 Now, as it is affirmatively shown that no Wall Street man ever heard one of these papers spoken of as an agreement to sell, and as there is a word about which there is no ambiguity, is not this Court justified in holding that means can be found for carrying out the transaction without incurring liability to stamp duty, and should not the Court hold that where one word, to wit, "Call," is recognized by everybody as expressing the paper in controversy that the public doing business under the law should not be put upon their inquiry as to what is involved in a periphrastic sentence which a lawyer might find was broad enough to cover the paper in controversy? The clear and express word for that paper is "Call." The periphrastic sentence
15 is "agreement to sell," which expression no stock broker ever heard applied to a "Call."

As was contended in my brief, and I simply bring it up again as bearing upon the phase of the argument which I am now presenting, that doubt as to the meaning of the construction must exclude such construction, I urge again that the plain, ordinary meaning of the words necessary to include a call was the word which was known to the lawmakers, known to lexicographers, and known to business men for a period running through the entire commercial history of the country, to wit: "calls." Everybody knows what a call is. Some people do not know what an agreement is. Unfortunately, I did not. I thought there could not be an agreement unless there were two
16 who mutually assented to a proposition. In that I was in error, but everybody knows what a call is. Why then, did not the lawmakers, if they wished to impose the obligation, use the words meaning a call, in the plain and ordinary words for such a paper?

Suppose this question had arisen in a criminal proceeding, and I had been indicted for issuing an unstamped call.

17 Suppose the defense and the government had respectively asked the court to charge the jury as follows:

CHARGE ASKED FOR THE DEFENSE.

"A man is presumed to be innocent until he is proved to be guilty. Unless the jury find that the words 'agreement to sell' in the statute were construed to mean calls by intelligent and conscientious business men among 'that public in which the law took effect,' then the jury must find for the defendant, although the court charges you that the words 'agreement to sell' is a phrase sufficiently comprehensive to include calls."

18 CHARGE ASKED BY THE GOVERNMENT.

"The court charges you as a matter of law that the words agreement to sell includes calls, and if the defendant signed a 'call' without affixing a stamp thereon, you must find him guilty, although no man in '*that public in which the law took effect*' had ever heard or thought of a 'call' as an 'agreement to sell,' and although that public would have understood that the word 'call' would have described the paper to be taxed '*in a clear and determinate manner from the language of the statute*' if the word 'call' had been used."

Which one of these charges would have followed the cases U. S. vs. Isham, 17 Wallace, and Adams vs. Bancroft, 3 Sumner cited 19 supra and in my original brief.

I cannot make the proposition plainer, and I deferentially submit it with the suggestion that the proper interpretation of the law would be the same in a criminal cause as it is in this case where the money was paid into the treasury under menace of a possible indictment.

Why make the average business man who knows what a call is, resort to an interpretation of an unusual sentence when this would leave no doubt.

I do not wish to weary the court. I think that the affidavits of the very eminent men which I have filed will show that no man in the stock exchange would ever have been led to believe that this paper was included in the law under the term "agreement to sell." There was 20 no indication to us as to what was right, when the internal revenue department swooped down upon us, for they held that a put, which is an offer to buy, was an agreement to sell, and they never reversed that decision, but acted under it through a series of years, until the attorney-general at my suggestion, in the argument to which I have referred, held that a put was not taxable.

POOR COPY

21 Will the court pardon me for a personal explanation? Until I made the trifling indebtedness of $604 involved in this suit, by my adhesion to what I believed to be right, I never had a nickel's interest in this question. The people who paid this tax are not the people who sell the instruments. I could have gone on and paid what I believed to be a wrongful tax, and what I proved to be a wrongful tax, so far as puts were concerned, through all the years that I might be doing business under the law, and it would never have cost me a cent., but all the money would have come out of a class of men among the poorest of those who hang on the frayed and tattered edges of Wall street life. There were none of these men who could have ever brought suits;
22 they have not the money. They were as honest and upright in most instances as we who sold the papers, but the rule was adopted at once —and adhered to by everyone save myself—that the person buying the puts and calls should pay the government tax. If I believed it right I should have adopted it. I was not willing to take money from a man poorer than I was, and as honest as I was, under a construction of the law which I believed to be inherently wrong, and so I made the stand, and after the government had taken many tens of thousands of dollars for tax on puts which before this time would have run into many hundreds of thousands of dollars for the tax on them, that tax was declared illegal and abandoned. I was not willing that the poorer
23 men, who were least of all in our business circles able to stand it, should pay it, and the internal revenue department was forced to overrule their own decision and abandon the tax on puts. I still stood for what I believed to be right, and for what I hope I may yet convince the court is right as to calls. I have taken all the trouble and expense in this litigation, not with the hope of getting any compensation whatever from any person in the world.

I have been a long time in Wall street and had much to do with the internal revenue department. I withstood from the first day that the claim was made until it was finally settled by this court, in the case of Bailey vs. Luther Clark et al., 21 Wall, 284, the wrongful contention on the part of the internal
24 revenue department that a ***man's debts*** were his capital in business. Under the law as then existed, a man was taxed one twenty-fourth of one per cent. monthly on his business, or on a capital of $200,000 he was taxed $1,000 in a year. The internal revenue department contended that he should be taxed on all the money that he borrowed

25 for his business, thus making the outrageously startling declaration that a man's capital was all he owned and all that he owed!

On the pledge of stocks which have a quick market value it was then customary, and is now, for a house to borrow ten times as much money as they have capital, so that on a capital of two hundred thousand dollars ($200,000) they borrowed two million dollars ($2,000,000) and were taxed eleven thousand dollars ($11,000) as a tax on their capital, or 5½ per cent. instead of ½ per cent. on their real capital.

Suit was brought and decided in the circuit court of the United States against the contention of the government, but that did not stop collecting the tax. That preposterous and unblushing assertion, that debts were capital, was finally brought to a conclusion by this court
26 after several years of the collection of money under that claim. Of course, this court decided against the contention of the internal revenue department, but during that time my neighbors in business were despoiled of more money under this false construction of a just law than was the commerce of the world ever despoiled by all the pirates that ever sailed the Spanish main. That unjust collection amounted to many millions of dollars. I say my neighbors were, in contradistinction to myself, for I refused to pay the tax and defied the department to make a distraint, which they never did. When under the recent war tax law they came down upon us with a claim that an offer to buy stocks was an agreement to sell them, and taxed puts
27 accordingly, while the actual purchase itself would never be taxed, it was the blast from the bugle of my old enemy which roused me to contest. And I have at least saved honest men from heavy, unjust collections as to puts.

I wish to make only one comment further in answer to the suggestion of the learned justice delivering the opinion, in which he says:

> "An isolated agreement to sell stock made by an individual
> "in Austin, Texas, is an agreement to sell, subject to the stamp
> "duty imposed. It is none the less an agreement to sell when
> "made in the Stock Exchange of New York, as one of a multi-
> "tude of similar transactions."

28 I recognize most fully the correctness of this statement, but I urge the further proposition that coming under the law as laid down in the United States vs. Isham, *supra*, the people in New York and other stock exchange centers are "the public in which this law is to take effect," and their understanding, if reasonable and conscientiously made, being of course justified by a sensible and fair-minded doubt,

29 is controlling under that decision, when an isolated case in Austin, Texas, would not be. I humbly suggest in the close of this argument that I am happy in the belief that this great tribunal, the first on the continent and the peer of the best in the world, stands far above any question of pride of opinion. If, in my poor efforts to express the reasons why the inquiry of the circuit court of appeals should be answered in the negative instead of the affirmative, I have laid undue stress upon a part of the argument in which I was in error, and did not sufficiently emphasize a matter which, on the whole, should be controlling, I am sure that this court will as gladly and cheerfully announce a different decision in the matter, as they would have announced had they never given an expression differing from the
30 claim for which I contend.

All of which I most respectfully submit with expressions of my profound respect for the opinion of this court, however it may be finally rendered.

S. V. WHITE,

Defendant in error, in person.

I, S. V. White, a counsellor of this court, do state on my honor as such counsel, that the foregoing petition is not interposed for delay, and is, as I verily believe, well founded in law.

S. V. WHITE,

31

Defendant in Person.

32

33 United States Supreme Court.

October Term. No. 227.

CHARLES H. TREAT,
Plaintiff in error,
vs.
STEPHEN V. WHITE.

I, Brayton Ives, do make oath and say:

That I am the President of the Metropolitan Trust Company
34 doing business on Wall street, New York City; that I have been for about thirty-three years a member of the New York Stock Exchange, having been for two years Vice-President and two years President; that I have no interest in any privilege nor in the stamp thereon; I state that I am acquainted with the instruments known as "Calls" on stocks; that I never heard a "Call" designated as an agreement to sell stocks, but always heard them designated simply as "Calls."

This affidavit is made for the purpose of showing the Stock Exchange nomenclature of such instruments in Wall street circles, and not otherwise.

BRAYTON IVES.

35

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK. }

Subscribed and sworn to before me }
this third day of May, 1901. }

JAMES WALSH,
Notary Public.
Kings County,
Certf. Filed N. Y. Co.

{ SEAL. }

36

I, J. Edward Simmons, do state on oath that I am President of the Fourth National Bank of New York City; that I was a member of the New York Stock Exchange from about 1869 to 1887; that I

37 was for two years its President; that I have read the affidavit of Brayton Ives, and I state that the same is true so far as the designation of "Calls" is concerned.

Further affiant saith not.

J. EDWARD SIMMONS.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK. }

Subscribed and sworn to before me
this third day of May, 1901.

38

JAMES WALSH,
Notary Public,
Kings County,
Certf. Filed N. Y. Co.

{ SEAL. }

39

40

41 United States Supreme Court.

October Term. No. 227.

CHARLES H. TREAT,
Plaintiff in Error,
vs.
STEPHEN V. WHITE.

I, Russell Sage, do state on oath that I have been for more than twenty-four years a member of the New York Stock Exchange; that during that time I have dealt in "Calls" upon millions of shares of
42 stock; that I read the affidavits of Brayton Ives and of J. Edward Simmons, and that I agree with them in the fact that I never heard a "Call" spoken of as an agreement to sell stocks. It has its well defined name of "Call," and is often spoken of also as a buyer's privilege or option.

This affidavit is made solely for the purpose of fixing the ordinary understanding as to the nomenculture of "Calls."

RUSSELL SAGE.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK.

43 Subscribed and sworn to before me this third day of May, 1901.

JAMES WALSH,
Notary Public,
Kings County.
Certf. Filed N. Y. County.

SEAL.

44

45

United States Supreme Court.

October Term. No. 227.

CHARLES H. TREAT,
Plaintiff in Error,
vs.
STEPHEN V. WHITE.

I, Stephen V. White, Defendant in error in the above entitled cause, do state upon my honor as a man and as an officer of this Court that for more than thirty-six years I have been constantly engaged in
46 business in the New York Stock Exchange and doing business within that time in the Stock Exchanges of Boston, Philadelphia, Chicago, and San Francisco; that in the course of such business I have dealt in "Calls" for hundreds of thousands of shares of stocks; that in that time I never heard one spoken of as an agreement to sell, but they were always designated either as Calls, or Privileges, or Options.

I make this statement as bearing upon the nomenclature by which men dealing in those papers are accustomed to designate and to hear them designated.

S. V. WHITE.

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Supreme Court of the United States.

No. 227.—October Term, 1900.

Charles H. Treat, United States Collector of Internal Revenue, Plaintiff in Error, vs. Stephen V. White. } On a certificate from the United States Circuit Court of Appeals for the Second Circuit.

[April 29, 1901.]

On September 18, 1899, S. V. White brought an action in the Supreme Court of the State of New York against Charles H. Treat, United States collector of internal revenue, to recover the sum of $604, alleged to have been unlawfully exacted by such collector. The action was removed to the United States Circuit Court for the Southern District of New York, and a judgment there rendered in favor of the plaintiff. (100 Fed. Rep. 290.) The case was taken to the United States Court of Appeals for the Second Circuit, which, before any decision, certified a question to this court. The statement of facts and question are as follows:

"From the 1st day of July, 1898, until the date of the commencement of this action the defendant in error, Stephen V. White, was doing business as a stock broker on the New York Stock Exchange. In the course of his business White sold 'calls' upon 30,200 shares of stock, the said 'calls' being of the same effect and tenor as Exhibit A, hereinafter set forth, and only varying in the names of the stock, the date and the price at which they were offered.

Exhibit A.

New York, *May* 18th, 1899.

"For value received the bearer may call on me on one day's notice, except last day, when notice is not required. One hundred shares of the common stock of the American Sugar Refining Company at one hundred and seventy-five per cent. at any time in fifteen days from date. All dividends, for which transfer books close during said time, go with the stock. Expires June 2, 1899, at 3 P. M.

(Signed) S. V. White.

"These 30,200 shares of stock, for which 'calls" at various times had been in existence, were, as matter of fact, never actually 'called,' and no stamp was put upon the same. That the plaintiff in error, Charles H. Treat, United States collector of internal revenue, demanded of the defendant in error, Stephen V. White, the sum of six hundred and four dollars, which sum was the value of 30,200 internal revenue stamps of the denomination of two cents each.

"This sum of six hundred and four dollars was paid by the defendant in error, Stephen V. White, under protest. Subsequently the defendant

in error demanded the return of the said six hundred and four dollars, but the demand was refused.

"Upon the facts set forth the question of law, concerning which this court desires the instruction of the Supreme Court for its proper decision, is:

"Is the above memorandum in writing, designated as Exhibit A, an 'Agreement to sell' under the provisions of section 25, Schedule A, act of Congress approved June 13th, 1898, and, as such, taxable?"

The collector acted under the provision of section 25 of Schedule "A" of the War Revenue act of June 13, 1898, (30 Stat. 448,) which reads as follows:

"On all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any association, company or corporation, whether made upon or shown by the books of the association, company or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock or to secure the future payment of money or for the future transfer of any stock, on each hundred dollars of face value or fraction thereof, two cents: *Provided*, That in case of sale where the evidence of transfer is shown only by the books of the company the stamp shall be placed upon such books; and where the change of ownership is by transfer certificate the stamp shall be placed upon the certificate; and in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale and the matter or thing to which it refers."

Mr. Justice BREWER delivered the opinion of the Court.

The question before us is simply one of statutory construction. Is a "call" (a copy of which is incorporated in the statement of facts) an agreement to sell, within the meaning of Schedule "A"? In reference to this the learned Circuit Judge, in delivering his opinion, said:

"It is an agreement, and manifestly an 'agreement to sell.' It may be referred to as an 'offer,' or an 'option,' or a 'call,' or what not, but it is susceptible of no more exact definition than 'an agreement to sell.' Inasmuch, therefore, as the statute requires stamps to be affixed 'on all sales, or agreements to sell,' it would seem that these 'calls' are within its provisions."

We fully agree with this definition. "Calls" are not distributed as mere advertisements of what the owner of the property described therein is willing to do. They are sold, and in parting with them the vendor receives what to him is satisfactory consideration. Having parted for value received with that promise it is a contract binding on him, and such a contract is neither more nor less than an agreement to sell and deliver at the time named the property described in the instrument. It may be a uni-

lateral contract. So are many contracts. On the face of this instrument there is an absolute promise on the part of the promisor and a promise to sell. We cannot doubt the conclusion of the Circuit Judge that this is in its terms, its essence and its nature an agreement to sell. Therefore it comes within the letter of the statute.

The defendant in error, who has argued in his own behalf with ability the questions presented, has referred in his brief to this rule of construction: that the duty of the court "is to take the words in their ordinary grammatical sense, unless such a construction would be obviously repugnant to the intention of the framers of the instrument, or would lead to some other inconvenience or absurdity." (Sedgwick, Construction of Statutory and Constitutional Law, 220.) With that rule of construction we are in entire sympathy, and approve of it. In the ordinary reading of this instrument no one would doubt that there was an agreement on the part of the promisor to sell at the time named the property therein described. That being the ordinary, natural, grammatical interpretation of the language, it is, as the learned Circuit Judge declared, neither more nor less than an agreement to sell. Why should not the ordinary meaning of the language in the statute be enforced in respect to this particular instrument? Certainly there must be some satisfactory reason for departing from the general rule of construction. It is also true, as said by this court in *United States* v. *Isham*, (17 Wall. 496, 504,) "If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because, in the language of Pollock, C. B., in *Girr* v. *Scudds*, (11 Exchequer, 191,) 'a tax cannot be imposed without clear and express words for that purpose.'" With that proposition we fully agree. There must be certainty as to the meaning and scope of language imposing any tax, and doubt in respect to its meaning is to be resolved in favor of the taxpayer. But when the language is clear a different thought arises.

We do not question the fact that there are times when the mere letter of a statute does not control, and that a fair consideration of the surroundings may indicate that that which is within the letter is not within the spirit, and therefore must be excluded from its scope. (*Church of the Holy Trinity* v. *United States*, 143 U. S. 457.) But that proposition implies that there is something which makes clear an intent on the part of Congress against enforcement according to the letter. Nothing of that kind exists in this case. There is nothing to suggest that Congress did not mean that this provision should be enforced according to its letter and spirit everywhere. The defendant in error, in the course of his argument, says that Congress must be assumed to have been familiar with the ordinary modes of dealing on the Stock Exchange of New York, and that if it intended by its legislation to reach "calls," a term well understood in that exchange, it would have named them or used some word which neces-

sarily includes them. But this takes for granted the question at issue and assumes that the words used do not include "calls." It is not to be assumed that Congress legislated with sole reference to transactions on stock exchanges, but its action is to be taken as having been exerted for the whole nation, and if it should so happen that dealings on any stock exchange come within the purview thereof, the parties so dealing are bound by it, and cannot claim an immunity from its burden. An isolated agreement to sell stock made by an individual in Austin, Texas, is an agreement to sell, subject to the stamp duty imposed. It is none the less an agreement to sell when made in the Stock Exchange of New York, as one of a multitude of similar transactions.

That there is a difference between an agreement to sell and an agreement of sale is clear. The latter may imply not merely an obligation to sell but an obligation on the part of the other party to purchase, while an agreement to sell is simply an obligation on the part of the vendor or promisor to complete his promise of sale. That Congress recognized the difference between these two terms is evident, because in the very next paragraph of Schedule "A" it provides, in reference to merchandise, for a stamp "upon each sale, agreement of sale, or agreement to sell." That no stamp duty was imposed on agreements to buy (or, in the vernacular of the stock exchange, "puts") furnishes no ground for denying the validity of the stamp duty on agreements to sell. The power of Congress in this direction is unlimited. It does not come within the province of this court to consider why agreements to sell shall be subject to stamp duty and agreements to buy not. It is enough that Congress in this legislation has imposed a stamp duty upon the one and not upon the other.

In conclusion, we may say that the language of the statute seems to us clear. It imposes a stamp duty on agreements to sell. "Calls" are agreements to sell. We see nothing in the surroundings which justifies us in limiting the power of Congress or denying to its language its ordinary meaning.

Therefore we answer the question submitted to us by the Circuit Court of Appeals in the affirmative, and hold that a "call" is an agreement to sell, and taxable as such.

True copy.

Test:

Clerk Supreme Court, U. S.